Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition to Establish Procedural	)	
Requirements to Govern Proceedings for	)	WC Docket No. 07-267
Forbearance Under Section 10 of the	)	
Communications Act of 1934, as Amended	)	

COMMENTS OF TIME WARNER TELECOM INC., ONE COMMUNICATIONS CORP., AND CBEYOND INC.

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TABLE OF CONTENTS

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Time Warner Telecom Inc. ("TWTC"), One Communications Corp. ("One Communications"), and Cbeyond Inc. ("Cbeyond") (collectively, the "Joint Commenters"), by their attorneys, hereby submit these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION.

While it is certainly appropriate for the Commission to initiate this rulemaking proceeding, at the most fundamental level it is both too little and too late. It is too little, because the most basic problem with the statutory forbearance regime is the language of the statute itself. As interpreted by the D.C. Circuit, Section 10 establishes a congressional directive that any forbearance petition that the Commission does not deny within the time period set forth in Section 10 results in an unappealable grant of relief to the petitioner. This is so, even if the petitioner offers no support for the requested forbearance and even if there is no support for the

[1] *See In re Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 22 FCC Rcd. 21212 (2007).

requested relief. Such a flawed statutory scheme must obviously be eliminated, but that cannot be achieved in an agency rulemaking such as this one. It can only be accomplished by Congress. Indeed, the Commission should request that Congress do just that.

This proceeding is also too late, because it comes after years of agency mismanagement of the Section 10 process. The list of the FCC's failings by commission and omission in the regard is depressingly long. For example, over the past several years, the Commission has accepted for consideration forbearance petitions in which petitioners do not even identify the regulations for which they seek forbearance, thereby forcing affected parties to expend resources on opposing relief that the petitioner might be (but often is not) seeking. The Commission has accepted forbearance petitions for which petitioners have provided no, or virtually no, factual or legal support, thereby denying interested parties the full opportunity to comment on the petitions. The Commission has failed to make proprietary information and even proprietary legal standards available in subsequent proceedings in which the information and standards are of central importance. The Commission has allowed petitioners to withdraw or narrow the scope of petitions at any time, usually when a petitioner learns that it is unlikely to receive the relief sought, thereby eliminating any deterrence to filing unsupported petitions and artificially skewing the Commission's jurisprudence in favor of forbearance grants. The Commission has failed to require that petitioners meet even the most rudimentary substantive analytical standards, such as properly defined product and geographic markets, in their petitions. Perhaps most importantly, the Commission has failed to adjust its voting rules to account for the fact that a timely 2-2 vote under its current rules results in no agency action. As a result, a 2-2 deadlock that is not broken by the statutory deadline results in a default grant of all of the relief sought in the petition, even if no commissioner actually supports this outcome.

The Commission's neglect and mismanagement of the Section 10 process has already resulted in substantial harm to consumer welfare, most importantly because the FCC has, by action and inaction, eliminated regulations in product and geographic markets (e.g., UNEs needed to serve businesses in Omaha and Anchorage and business broadband special access services such as Ethernet and OCn in the ACS, Verizon and AT&T territories) where there was no justification for doing so.

Eliminating Section 10 is the only way to prevent future damage from the forbearance process. Nevertheless, it is worthwhile for the Commission to at least limit the extent to which forbearance proceedings are mismanaged in the future. Accordingly, in order to address the most glaring problems, the Commission should adopt the following requirements in this proceeding:

- Pleading requirements for forbearance petitions to ensure that, when filed, such petitions are sufficiently clear and supported by all facts in the petitioner's possession and by all legal arguments that the petitioner plans to make;
- Specific requirements for meeting a petitioner's burden of proof, including the requirement that a petitioner seeking the elimination of dominant carrier or unbundling regulation propose appropriate product and geographic markets;
- Pleading schedules following those proposed by the petition for rulemaking in this proceeding;
- Protective orders that allow parties to use all information and standards from prior proceedings that the Commission will likely use to determine subsequent petitions;
- Meaningful limits on petitioners' right to narrow or withdraw petitions; and
- Voting rules for forbearance proceedings under which a timely 2-2 tie vote constitutes a denial.

These basic rules, if adopted, would limit, at least to some extent, the harms caused by forbearance petitions to consumer welfare and the administrative process.

II. THE FCC SHOULD URGE CONGRESS TO REPEAL SECTION 10 OF THE COMMUNICATIONS ACT.

Unfortunately, the most significant problems with Section 10 of the Act cannot be solved in the instant proceeding. Most of the problems caused by Section 10 arise from the language of the provision itself, and only Congress can repeal Section 10, or at the very least, remove the "deemed granted" clause from that provision.[2] Indeed, the most important step that the FCC could take to address the problems created by Section 10 is to recommend to Congress that it repeal the provision.

There is ample basis for doing so, because, no matter what procedural rules the Commission adopts, the very existence of Section 10 results in flawed public policy. Among other things, Section 10 of the Act (1) where the FCC fails to act, allows the party seeking forbearance to receive all of the relief sought in its petition regardless of whether it is justified, and interested parties have no right to the appeal that outcome; (2) creates regulatory uncertainty, thus diminishing companies' ability to make long-term investments and to make long-term business plans based on existing regulatory arrangements; (3) allows private companies to control the FCC's agenda, thus preventing allocation of agency resources to issues of the greatest importance to public policy generally as opposed to the concerns of individual companies; and (4) forces the Commission to address issues in isolated quasi-adjudication proceedings that are more appropriately addressed in general rulemakings. These problems can be completely resolved only by repealing Section 10.

[2] *See* 47 U.S.C. § 160(c).

III. THE FCC'S FAILURE TO ADOPT SOUND PROCEDURAL AND SUBSTANTIVE RULES GOVERNING SECTION 10 PETITIONS HAS MADE AN ALREADY BAD SITUATION WORSE.

If the terms of Section 10 were not bad enough by themselves, the FCC has made a difficult situation far worse by passively and ineffectively administering the forbearance process. The absence of affirmative rules designed to diminish the threat of harm posed by Section 10 has led to numerous problems.

A. The FCC Has Permitted Parties Seeking Forbearance To File Petitions In Which The Petitioner Fails Even To Specifically Identify The Regulations For Which It Seeks Forbearance.

The FCC has allowed parties to file forbearance petitions in which the petitioners sometimes even fail to specify the provisions from which they seek forbearance. By accepting for consideration such obviously flawed petitions, the Commission has imposed unnecessary and inappropriate costs on private parties and it has needlessly undermined the administrative process.

There are numerous instances in which petitioners have failed to identify clearly the regulations for which they seek forbearance or the services for which they seek such relief. For example, SBC sought the elimination of "common carrier regulation" for IP-enabled services without defining what it meant by common carrier regulation.[3] Likewise, Verizon requested forbearance from "common carriage requirements" governing optical and packetized services, but it failed to define that phrase, thereby causing confusion when its petition was granted by default.[4]

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[3] *See* Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004) ("SBC IP-Enabled Services Forbearance Petition").

[4] *See* Petition of the Verizon Tel. Cos. for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules With Respect to Broadband Services, WC Docket No. 04-440, at 8

This failure to identify clearly the services and regulations covered by forbearance petitions imposes real and unnecessary costs on private parties and on the agency. For example, in its petitions for forbearance from unbundling obligations in six MSAs, Verizon requested "substantially the same regulatory relief" as that granted by the Commission in the *Omaha Forbearance Order*.[5] At the same time, however, Verizon requested forbearance from dominant carrier regulation but did not explicitly and consistently limit its request to switched access services for the mass market, as would have been consistent with the relief granted in the *Omaha Forbearance Order*.[6] Verizon's petitions thus created ambiguity by leaving open the possibility that Verizon was seeking forbearance from dominant carrier regulation of special access services.[7] The vagueness of Verizon's petitions caused several commenters to ask the Commission to clarify that Verizon's requests did not apply to special access services.[8] Indeed, the vagueness of Verizon's petitions compelled T-Mobile, a party that would not have otherwise devoted resources to participating in a wireline forbearance proceeding, to file reply comments

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(filed Dec. 20, 2004) (stating that "common carriage requirements under Title II . . . includes, *among other things*, tariff filing, cost support, and pricing requirements") (emphasis added) ("Verizon Broadband Forbearance Petition").

[5] *See, e.g.,* Petition of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160 in the New York MSA, WC Docket No. 06-172, at 1 (filed Sept. 6, 2006) ("Verizon New York UNE Forbearance Petition").

[6] *See* Verizon New York UNE Forbearance Petition n.3; *see also* Opposition of EarthLink, Inc. and New Edge Network, Inc. To The Petition Of Verizon Telephone Companies For Forbearance, WC Docket No. 06-172, at 58 (filed Mar. 5, 2007) ("EarthLink Opposition"); Reply Comments of T-Mobile USA, Inc., WC Docket No. 06-72, at 3-4 (filed Apr. 18, 2007) ("T-Mobile Reply Comments").

[7] *See, e.g.,* EarthLink Opposition at 58; T-Mobile Reply Comments at 3-4.

[8] *See* ACN et al. Opposition to Verizon's Petitions, WC Docket No. 06-172, n.1 (filed Mar. 5, 2007); *see also* T-Mobile Reply Comments at 3 (arguing that "Verizon's requests are so broad and vague that, absent an explicit Commission ruling to the contrary, Verizon could urge an interpretation that encompasses special access regulation").

opposing *the mere possibility* that Verizon was seeking forbearance relief with respect to special access services. *See generally* T-Mobile Reply Comments. The Commission's ultimate decision to interpret the scope of Verizon's requests to exclude special access or enterprise services[9] does not change the fact that commenting parties had to protect their interests by addressing, in the record, the possibility that Verizon's expansive and ambiguous requests could have been interpreted differently.

Similarly, in its pending petition for forbearance from regulation in four MSAs, Qwest has not explicitly requested forbearance from dominant carrier regulation of special access services. Instead, it requests forbearance from dominant carrier regulation of both mass market and enterprise services in those four MSAs and fails to consistently limit its request to switched access services.[10] Moreover, in its petitions, Qwest cites rules governing switched access services that also mention special access in certain subsections, but it fails to specify that it seeks forbearance only to the extent that the rules apply to switched access.[11] This ambiguity creates the same possibility that Qwest's petitions encompass special access as the Verizon 6-MSA

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[9] *See Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, ¶¶ 17-18 (2007) ("*Verizon 6-MSA Forbearance Order*").

[10] *Compare* Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington MSA, WC Docket No. 07-97, at 3 (filed Apr. 27, 2007) ("Qwest Seattle UNE Forbearance Petition") *with id.* at 29.

[11] *See* Qwest Seattle UNE Forbearance Petition nn.6-7; 47 C.F.R. §§ 61.42(e)(3) & 61.58(c); *see also* Reply Comments of T-Mobile USA, Inc., WC Docket No. 07-97, at 4 & n.10 (filed Oct. 1, 2007) ("T-Mobile Reply Comments in Qwest 4-MSA Proceeding").

forbearance petitions did, again causing commenting parties to expend resources to address hypothetical situations in the record.[12]

Just as commenters should not be forced to devote significant resources to opposing vague and far-reaching forbearance requests, the Commission should not have to devote its limited resources to narrowing such forbearance requests. In numerous orders[13] and at least one appeal,[14] the FCC has expended resources determining the scope of the relief sought by a petitioner and the consequences of failure to define that relief precisely.

B. The Commission Has Allowed Parties To File Petitions That Are Not Supported By Sufficient Factual Information Or Legal Arguments.

The FCC has also permitted parties to file petitions for forbearance with virtually no factual or legal support. This now common practice allows petitioners to dictate how and when they submit information to support their petitions. There are many examples of forbearance petitions filed with little or no factual or legal support. First, in its petition for forbearance from common carrier regulation of broadband services, Verizon argued that relief was warranted

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[12] *See, e.g.,* T-Mobile Reply Comments in Qwest 4-MSA Proceeding at 6 (arguing that "if the Commission were to find that Qwest is requesting regulatory forbearance from special access regulations, the Commission should deny any such request") (capitalization omitted).

[13] *See, e.g.*, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha MSA*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶¶ 16-17 (2005) ("*Omaha Forbearance Order*"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulations of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion & Order, 22 FCC Rcd. 1958, ¶¶ 20-22 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of* Computer Inquiry *and Certain Title II Common-Carriage Requirements*, Memorandum Opinion & Order, 22 FCC Rcd. 19478, ¶¶ 13-14 (2007).

[14] *See* Brief for Respondents, AT&T v. FCC, No. 05-1186, at 26-31 (D.C. Cir. filed Nov. 28, 2005) (defending FCC's decision to reject SBC's petition for forbearance from regulation of IP-enabled services for SBC's failure to clearly identify the specific provisions of Title II from which it sought forbearance).

based essentially on the unsupported assertion that the industry is in the "age of abundant broadband competition."[15] Second, in support of its petition for forbearance from regulation of IP-enabled services, SBC relied almost exclusively on its assertion that, "because no single entity or class of entities dominates the provision of IP platform services, . . . the market for IP platform services operates well without regulation."[16] Third, in its petition for forbearance from regulation of packetized and optical services, Qwest requested the same relief deemed granted to Verizon by operation of law almost entirely on the ground that "[i]t is impossible to find that Verizon meets the forbearance standard in Section 10(a) of the Act, without finding that Qwest also meets the same standard."[17] Fourth, in AT&T's petition for forbearance from regulation of packetized or optical services, AT&T argued that forbearance was justified based on little more than its assertion that the broadband services at issue "are subject to robust competition on a nationwide basis and these services are sold to sophisticated business customers that demand customization."[18]

Moreover, as the Petitioners in this proceeding explain (Petition at 4), parties seeking forbearance frequently submit new data and legal arguments as *ex parte* filings long after initial comments are due. If this were not enough, some petitioners wait until the proverbial, or literal, eleventh hour to file this new information. Where this is the case, and in light of the statutory

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[15] Verizon Broadband Forbearance Petition, at 14.

[16] SBC IP-Enabled Services Forbearance Petition, at 5.

[17] Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules With Respect To Its Broadband Services, WC Docket No. 06-125, at 2 (filed June 13, 2006) ("Qwest Broadband Forbearance Petition").

[18] Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules With Respect To Its Broadband Services, WC Docket No. 06-125, at 2 (filed July 13, 2006) ("AT&T Broadband Forbearance Petition").

deadline for agency decisions on pending forbearance petitions, interested parties have little or no time to respond to the newly filed information, and the Commission has little or no time to review and analyze such information. The Commission's decisionmaking suffers as a result.

For instance, only one business day before the expiration of the statutory deadline (the FCC had already extended the deadline by the discretionary 90-day period) for the Commission to act on Verizon's petition for forbearance from unbundling obligations under Section 271(c), Verizon filed a 19-page "paper" (styled much like a brief or comments) raising new arguments.[19] Obviously, interested parties were unable to respond.

More recently, Verizon waited until the last day of the formal pleading cycle established by the Commission to "ma[k]e its first attempt at producing market-specific empirical data" to support its petitions for forbearance from unbundling requirements in six MSAs.[20] In fact, Verizon's Reply Comments in that proceeding included 11 exhibits totaling over 500 pages that were not posted and made publicly available on the Commission's Electronic Comment Filing System ("ECFS") until almost three weeks after they were filed.[21] As ACN indicated shortly thereafter, even if the Commission had reopened the pleading cycle to provide interested parties additional time to file comments on the data, the FCC would have had little time to undertake a comprehensive review of those comments or rely on them in an order before the 15-month

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[19] *See* Letter from Susanne A. Guyer, Verizon, to Chairman Powell and Commissioners, FCC, filed in CC Dkt. No. 01-338 (Oct. 24, 2003) & Attachment (entitled "The Commission Should Forbear From Imposing Any Section 271 Unbundling Obligations On Broadband").

[20] *See* ACN et al. Motion to Dismiss Or, In the Alternative, To Deny Petitions For Forbearance On The Basis Of Late-Filed Data, WC Docket No. 06-172, at 5 & n.9 (filed May 22, 2007) ("ACN Motion") (citing Verizon Reply Comments in WC Docket No. 06-172 (filed April 18, 2007)). Indeed, Verizon filed this supporting data more than seven months after it filed its 6-MSA forbearance petitions.

[21] *See* ACN Motion at 5 nn.9-10.

statutory deadline.[22] Verizon then filed substantial legal arguments and factual information in support of its petitions only two days before the statutory deadline for action on its 6-MSA forbearance petitions.[23] Other parties obviously had no ability to respond to this filing.

C. The FCC Has Followed An *Ad Hoc*, Incoherent Policy For Treatment Of Proprietary Information In Forbearance Proceedings.

As the Petitioners in this proceeding have explained, the Commission's protective orders in recent forbearance proceedings have "expressly prohibited the use of Confidential and Highly Confidential information submitted in the docket for any purpose other than the preparation and conduct of the forbearance proceeding in which the document was submitted and any judicial proceeding arising directly from the forbearance proceeding." Petition at 22. Unfortunately, the Commission has used information subject to this protection to establish precedential legal standards governing petitions for forbearance from dominant carrier regulation for mass market switched access and from Section 251(c) unbundling obligations. As a result, parties have been forbidden from discussing information used to establish the legal standards or the standards themselves that govern such forbearance proceedings.

For example, interested parties in the recent Verizon 6-MSA forbearance proceeding could not access or rely upon the confidential information used by the Commission to derive the market share standard established in the *Omaha Forbearance Order*. Accordingly, these parties were unable to fully comment on whether the data filed by Verizon in support of its 6-MSA

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[22] *Id.* at 5.

[23] *See* Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Dec. 3, 2007) ("*December 3rd Ex Parte*"). Verizon filed its *December 3rd Ex Parte* only days after filing two other substantive *ex partes*. *See Verizon 6-MSA Forbearance Order*, n.88 (citing Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 30, 2007); Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 28, 2007)).

forbearance petitions satisfied that standard. In fact, commenting parties *could not even discuss* the market share standard set forth in the *Omaha Forbearance Order*, or the application of that standard in the *ACS Anchorage UNE Forbearance Order*, in the Verizon 6-MSA forbearance proceeding.

To the extent that parties seeking forbearance continue to base their requests on Commission forbearance precedent that relied upon confidential information, interested parties will remain unable to fully participate in such proceedings.[24] The FCC, in turn, will continue to be deprived of a robust record on which to evaluate the subsequent forbearance petitions. The result is a vicious cycle in which the FCC relies on its existing forbearance precedent to make future forbearance determinations (and in the process, sets new precedent) without allowing the parties potentially affected by such determinations to rely on that secret precedent in advocating for or against the grant of pending petitions.

D. Petitioning Parties Have Dictated Whether The Commission Reaches A Decision Regarding The Issues Presented In A Forbearance Petition.

The Commission has repeatedly permitted petitioners to try their luck by filing forbearance petitions only to withdraw or narrow the scope of the petitions, often near the expiration of the statutory time period, if they suspect that they will not obtain the relief sought. For example, only one day before the statutory deadline, Level 3 withdrew its access charge forbearance petition. Level 3 did so apparently because then-Chairman Michael Powell, who supported the petition, left the Commission days before the statutory deadline for agency action.[25] Likewise, with less than one week remaining until expiration of the statutory time

[24] *See, e.g.,* Broadview Networks, Inc. et al. Motion to Modify Protective Order, WC Docket No. 04-223, at 2 (filed Oct. 11, 2006); NuVox Communications et al. Reply, WC Docket No. 06-172, at 4 (filed Nov. 2, 2006).

[25] *See* "Level 3 Withdraws Access Charge Petition," Communications Daily (Mar. 23, 2005).

period, Verizon withdrew its petition for forbearance from dominant carrier regulation following the sunset of certain Section 272 requirements. It did so because, according to investment analysts, its request "'faced some resistance'" at the Commission, and Commissioner McDowell, representing the potential swing vote in favor of a grant, might have been recused from voting on the petition.[26] Most egregiously, Qwest withdrew its petition for forbearance from regulation of packetized and optical services on the same day as the statutory deadline because it was clear that the company would not receive all of the relief it had requested. In fact, Qwest's Senior Vice President for Federal Regulations, Shirley Bloomfield, conceded that "[a]t the 12th hour, from all indications, it didn't look like we would get any relief" beyond what had already been granted in a separate Commission order earlier in the year.[27] Incredibly, only two days later, Qwest refiled its broadband forbearance petition in the hope that it would be granted more relief on the second try.[28]

The absence of any limits on petitioners' ability to withdraw forbearance has a number of negative effects. *First*, it allows parties to file their requests risk-free, without any concern that such filings might result in negative precedent. There is therefore nothing to deter a petitioner from causing affected parties to incur enormous expense to oppose petitions that should not have been filed in the first place. *Second*, allowing this practice wastes limited agency resources on consideration of petitions that are meritless and on consideration of proceedings that do not yield precedents that guide the industry and other affected parties. *Finally*, this practice skews FCC

[26] *See* "Verizon Withdraws Forbearance Petition," Communications Daily (May 30, 2007) (quoting Stifel Nicolaus analysts).

[27] "Qwest Poised to File New Forbearance Petition," Communications Daily (Sept. 13, 2007).

[28] *See* Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services, WC Docket No. 06-125 (refiled Sept. 12, 2007).

jurisprudence by yielding far more decisions in favor of forbearance rather than against forbearance.

E. The FCC Has Failed To Release Forbearance Decisions By The Statutory Deadline.

The Commission has repeatedly failed to release orders deciding the merits of pending forbearance petitions before expiration of the 15-month statutory time period. These delayed actions have led to regulatory uncertainty and in some cases resulted in lengthy appellate proceedings.

For example, the FCC released the text of its *Order* addressing Core Communications' petition to forbear from certain intercarrier compensation rules ten days after it voted on the petition and seven days after the statutory deadline. *See In re Core Communications, Inc.*, 455 F.3d 267, 274-75 (D.C. Cir. 2006). Although the DC Circuit rejected Core's claim that the FCC's *Order* was invalid because it was issued after the Section 10 deadline, it did so on procedural grounds and explained that:

> Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a backdating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.

Id. at 277. At a minimum, the FCC's failure to release a timely forbearance order has often resulted in a court challenge by the petitioner, which in turn wastes the limited resources of the Commission in defending the order and of the courts in hearing the appeal.

In some cases, the consequences of the Commission's failure to release an order by the statutory deadline are even more significant. In the Omaha forbearance proceeding, for instance, the FCC issued a news release announcing its decision to partially grant Qwest's petition on the last day of the 90-day extension period, but the FCC did not release the text of its *Order* until

nearly three months later.[29] As a result, for the 77 days between the release of the News Release and the text of the *Order*, neither Qwest nor any of the CLECs in the Omaha MSA were on notice as to the specific terms of the FCC's decision. As Qwest argued in its appeal of the *Omaha Forbearance Order* before the D.C. Circuit, even if news releases had any binding effect, Qwest could not have possibly relied on the News Release because it "did not identify which wire centers got unbundling relief and which did not" and "did not mention any ruling on [Qwest's] request for forbearance from being classified as an incumbent carrier."[30] If this were not enough, the FCC backdated the effective date of the *Order* it ultimately issued to the effective date of the News Release. *Omaha Forbearance Order* ¶ 112 & n.282. Thus, the News Release "did not reveal that the six-month transition period had begun to run" and "did not indicate that the FCC had made its decision effective on the day of the vote."[31] As a result, the transition period for affected CLECs and other parties was severely truncated.

F. The FCC Has Not Required Parties Seeking Forbearance To Satisfy Meaningful and Consistent Substantive Standards.

The Commission has not required parties seeking forbearance to meet meaningful and consistent substantive standards before receiving the requested relief. For example, when seeking the elimination of dominant carrier and unbundling regulation, petitioners are often neither required to define relevant product and geographic markets nor required to provide any level of analysis regarding demand or supply substitutability within those markets. The FCC in turn has employed a level of rigor in its competition analysis that falls far short of what is

[29] *See* FCC, News Release, "FCC Grants Qwest Forbearance Relief in Omaha MSA," (rel. Sept. 16, 2005).

[30] Reply Brief for Petitioner Qwest Corp., Qwest v. FCC, No. 05-1450 et al., at 6 (D.C. Cir. filed Oct. 25, 2006).

[31] *Id.* at 6.

appropriate for the evaluation of forbearance petitions. The result has been a series of orders that have muddied the regulatory waters in several ways.

First, the FCC has granted forbearance petitions despite the fact that it has no idea if the competition in any particular area in which it grants relief actually satisfies its own forbearance standard. For instance, in the *Omaha Forbearance Order*, the FCC granted forbearance in the enterprise market without determining whether Cox's enterprise customer coverage satisfied the wire center-by-wire center test for market coverage that it established for the mass market in the very same *Order*. Instead, the Commission chose to grant forbearance in the enterprise market by relying on an average enterprise customer coverage level across the nine wire centers for which it had already decided to grant forbearance in the mass market. By using a nine-wire center average, the Commission had no basis for concluding that the coverage test was met in any one of the nine wire centers at issue.[32]

Second, the FCC has consistently relied on competition in one product market as the basis for determining whether to retain economic regulation in an entirely different product market. For example, the Commission relied on Cox's success in the mass market in Omaha as the basis for eliminating unbundling requirements applicable to business services that belong to different product markets. *See Omaha Forbearance Order* ¶ 66. As a result, it appears that business customers have suffered from diminished competition post-forbearance.[33] More recently, the Commission assessed whether to retain unbundling requirements for loops needed

[32] In *Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007), the D.C. Circuit deferred to the FCC's methodology in the *Omaha Forbearance Order*. However, such deference does not mean that the methodology used by the Commission was the most appropriate approach.

[33] *See generally* Petition for Modification of McLeodUSA Telecomms. Svcs., Inc., *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Dkt. No. 04-223 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

to serve business customers in the Verizon 6-MSA proceeding based on the extent to which competitors had achieved market share gains in the residential telephone market. This is like assessing the level of competition in the Champagne market based on an analysis of the market for soda.

Third, the FCC has assumed the presence of intermodal competitors in relevant product markets without offering any basis for such assumptions. For example, in the *Verizon 6-MSA Forbearance Order*, the Commission took into account cut-the-cord wireless substitution purportedly "consistent with recent precedent" in the *Verizon-MCI Merger Order*[34] and the *AT&T-BellSouth Merger Order*.[35] *Verizon 6-MSA Forbearance Order* n.89. However, the Commission's analysis of wireless substitutability in those *Merger Orders* was anything but robust. In the *Verizon-MCI Merger Order*, the FCC decided to include mobile wireless services in the local services product market because (1) the Bureau of Labor Statistics' 2004 Household Telephone Survey indicated that approximately 6 percent of households had cut the cord; (2) "Verizon consider[ed] this growing substitution in developing" its marketing campaigns and corporate strategy for local services offerings; and (3) the Commission had already predicted in the *Sprint/Nextel Merger Order*[36] that post-merger, the company (a) would likely act to increase intermodal competition between wireline and wireless services and (b) was planning to encourage consumers to cut the cord. *See Verizon-MCI Merger Order* ¶¶ 91-92; *see also AT&T-*

[34] *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433 (2005) ("*Verizon-MCI Merger Order*").

[35] *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662 (2007) ("*AT&T-BellSouth Merger Order*").

[36] *Applications of Nextel Communications, Inc. and Sprint Corp. for Consents to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967 (2005).

Bell South Merger Order ¶¶ 95-96. None of these is especially persuasive since (1) there is often some substitution between products that are not considered to belong to the same product market;[37] (2) the FCC never described how and to what extent Verizon considered wireless substitution in its marketing practices (e.g., how it changed its marketing and pricing, if at all, to address competition from wireless); and (3) the FCC never determined whether Sprint had in fact taken any steps to increase intermodal competition. On a more basic level, the Commission never even tried to assess the substitutability of fixed and wireless telephone services in the *Verizon 6-MSA Forbearance Order*.

Fourth, the Commission has ignored the fact that in the wholesale market, a single facilities-based competitor is insufficient to meet the requirements of Section 10. In the *Omaha Forbearance Order*, for example, instead of conducting an analysis of the competitiveness of the wholesale market in the Omaha MSA, the FCC relied on a baseless "predictive judgment" that the presence of a single competitor, a cable operator with limited network coverage among enterprise customers, would give Qwest the incentive to offer competitors wholesale inputs at reasonable terms and conditions. *See Omaha Forbearance Order* ¶ 79. Of course, this predictive judgment has proven to be wrong and one competitive carrier, McLeodUSA, has been unable to obtain high-capacity loops from Qwest at reasonable prices.[38]

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[37] *See, e.g., United States. v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11th Cir. 1997) ("Although every product has a substitute, the relevant product market does not encompass all substitutes."); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 613 (1953) ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products who 'cross-elasticities of demand' are small.") (internal citation omitted).

[38] *See generally* McLeodUSA Petition for Modification.

G. The FCC's Existing Policy Fails To Minimize The Likelihood Of Unreviewable "Deemed Granted" Forbearance Petitions.

The FCC has failed to minimize the likelihood that a forbearance petition could be "deemed granted" under Section 10(c) if it does not deny the petition by the statutory deadline. This is because the FCC has not adjusted its voting procedures or its interpretation of the term "deny" in the context of Section 10(c). Rather, the Commission has apparently extended its practice of treating 2-2 tie votes as non-action to the forbearance context.[39] As demonstrated by the default grant of Verizon's broadband forbearance petition, the FCC's practice is a terrible policy because it can result in the grant of relief that *none* of the voting Commissioners apparently support.[40] Indeed, even the draft order circulated by Chairman Martin reportedly rejected a significant portion of the relief requested by Verizon, including elimination of common carrier regulation of the broadband services at issue.[41] More importantly, the D.C. Circuit has held that the grant of a forbearance petition by operation of law under Section 10(c) is not reviewable.[42] Thus, the FCC's existing policy with respect to the "deemed granted"

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[39] *See Petition of Verizon Tel. Cos. For Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to Their Broadband Services*, WC Docket No. 04-440, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate (Mar. 20, 2006) ("Joint Statement").

[40] *See id.* (explaining that none of the Commissioners supported granting Verizon the full relief sought in Verizon's petition as drafted).

[41] *See* Mark Sullivan, "FCC Helps Verizon's Enterprise Game," Light Reading, Mar. 22, 2006, http://www.lightreading.com/document.asp?doc_id=91238&print=true ("As time was running out to grant or deny Verizon's petition, Chairman Martin circulated a draft order that would have relieved Verizon of *some* but not all of the regulations on its enterprise broadband business. Martin apparently agreed that Verizon deserved to be freed of certain rules, but did not want to relinquish all regulatory control.") (emphasis in original).

[42] *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007).

provision of Section 10(c) insulates the Commission's default grant of a forbearance petition from judicial review, thereby denying affected parties their right to appeal the grant.

H. The FCC Has Failed To Enforce Its Own Merger Condition Designed To Limit The Harmful Consequences of Forbearance.

The Commission has even failed to enforce a condition it imposed on approval of the merger between AT&T and BellSouth that was specifically designed to minimize the harms posed by forbearance. The FCC conditioned merger approval in part on the requirements that "AT&T/BellSouth will not seek or give effect to any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities under these merger commitments during the period in which those obligations are in effect." *AT&T-BellSouth Merger Order*, App. F. Nevertheless, the FCC granted AT&T's petition for forbearance from application of Title II regulation and the *Computer Inquiry* rules to certain broadband services,[43] which, among other things, allows AT&T to escape its obligation, also imposed by the *AT&T-BellSouth Merger Order*,[44] to reduce Ethernet tariffed services by 15 percent. Thus, by granting AT&T's broadband forbearance petition, the Commission has permitted *exactly* what the restriction on forbearance in the *AT&T-BellSouth Merger Order* was designed to prevent.

IV. THE COMMISSION SHOULD ESTABLISH PROCEDURAL RULES FOR FORBEARANCE PROCEEDINGS THAT LIMIT THE EXTENT TO WHICH SECTION 10 RESULTS IN BAD DECISIONS AND BAD PUBLIC POLICY.

While the problems caused by Section 10 can only be fully addressed by repealing the provision, the Commission can at least limit the harmful consequences of this provision by adopting sound procedural and substantive rules.

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[43] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 1 (2007).

[44] *See id.*, App. F.

A. The FCC Should Establish Pleading Requirements To Ensure That Forbearance Petitions Are Sufficiently Clear, Comprehensive And Supported.

In order to ensure that forbearance requests are sufficiently clear, the FCC should require petitioners to provide specific citations to each of the statutory provisions, FCC regulations, or passages in FCC orders from which they seek to forbear. It is not enough, for example, for petitioners to state that they seek the elimination of "common carrier regulation." As the Commission held in its *Order* rejecting SBC's petition for forbearance from "Title II common carrier regulations" of IP-enable services, the uncertainty created by SBC's failure "to identify precisely which provisions of Title II are covered by [its] petition" "would make it difficult, if not impossible, to determine that the three prongs of [S]ection 10(a) have been satisfied."[45] Moreover, while the D.C. Circuit remanded AT&T's appeal of that *Order* to the FCC for further explanation, it did so only because the Commission failed to distinguish its holding in the *Order* from the standard articulated in previous decisions.[46] Those decisions are distinguishable,[47]

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[45] *See In re Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion & Order, 20 FCC Rcd. 9361, ¶ 16 (2005).

[46] *See AT&T Inc. v. FCC*, 452 F.3d 830, 838 (D.C. Cir. 2006) ("AT&T argues that further specificity was unnecessary because the terms 'economic' and 'common carrier' clearly refer to specific provisions in Title II. Citing an order and two NPRMs in which the Commission itself used these terms—*In re: Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22,404 (2004) ("*Vonage* order"), IP-Enabled Services, 19 FCC Rcd. 4863 (proposed 2004), and Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798 (proposed 2002) . . .").

[47] In *AT&T v. FCC*, AT&T pointed out that the FCC stated that it was forbearing from "economic regulations" in the *Vonage Order* while the FCC subsequently held that AT&T's request for the elimination of economic regulation was too vague. But the FCC used this phrase in the *Vonage Order* to describe the scope of its *preemption*, a scope that was itself defined by the Minnesota orders, rules and statutes at issue. *Vonage Order* nn.30, 78. The two NPRMs cited by AT&T in *AT&T v. FCC* are also distinguishable precisely because they are NPRMs. Regardless of the standard under the notice-and-comment provisions of the Administrative

however, and in any event, it is only reasonable that the party seeking forbearance bear the burden of setting forth the specific relief requested.

The FCC should also draw on its own requirements governing Section 271 applications for BOC entry into the long-distance market and complaints on the Enforcement Bureau's so-called Accelerated Docket to establish rules that will ensure that forbearance petitions are adequately comprehensive and supported at the time of filing. For example, the Commission requires Section 271 applications to include all of the factual evidence on which the applicant would have the Commission rely "as originally filed."[48] Similarly, the FCC's pleading requirements for Accelerated Docket complaints provide that "the complaint and answer will fully set out the facts and legal theories on which the parties premise their claims and defenses."[49] The Commission's Section 271 application rules also provide that, "[i]n order to meet its burden of proof, the applicant may submit new evidence after filing solely to rebut arguments made or facts submitted by other commenters."[50] Further, the FCC has stated that generally, it is inappropriate for a Section 271 applicant "to make any part of the initial *prima facie* showing for the first time in reply comments or in *ex parte* submissions."[51]

Procedure Act, the FCC has the discretion to require specificity from parties seeking forbearance in light of the strict timeline and default grant provisions of Section 10.

[48] *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd. 6923, 6925 (rel. Mar. 23, 2001) ("*Section 271 Application Public Notice*").

[49] *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd. 17018, ¶ 40 (1998); 47 C.F.R. § 1.721(f)(1)(ii).

[50] *Section 271 Application Public Notice*, 16 FCC Rcd. at 6925.

[51] *Id.* at 6926.

Building on these precedents, the FCC should require forbearance petitions to include all of the factual information in the petitioner's possession that it plans to use in support of the relief requested. The petitioner should only be permitted to supply additional information after the filing of the initial petition if the information was not available prior to the date on which the petition was filed, and either (i) the information is provided in response to a specific factual assertion made by an opponent of the petition and that could not have been reasonably anticipated by the petitioner; or (ii) the information is provided in response to a request by the FCC. The FCC should also require forbearance petitions to include all legal arguments upon which the petitioner relies for the relief sought, except those made in response to a specific legal argument made by an opponent of the petition and that could not have been reasonably anticipated by the petitioner.

The Commission's Section 271 application rules require all "factual assertions" to "be supported by an affidavit or verified statement of a person or persons with personal knowledge thereof."[52] Similarly, the Commission should require that forbearance petitions include sworn affidavits supporting all factual assertions. Forbearance petitions that do not meet these filing requirements regarding (1) specificity; (2) factual information; (3) legal arguments; and (4) sworn affidavits should be dismissed without prejudice. Ensuring that petitions are complete and in full detail when filed will reduce the problems that result from ambiguous and incomplete filings. *See supra* Part III.A.

[52] *Id.*

B. The FCC Should Require Parties Seeking Forbearance To Bear The Ultimate Burden Of Proving That Each Of The Three Prongs Of The Section 10 Standard Are Satisfied.

As the Petitioners in this proceeding have asserted, a party seeking forbearance bears the ultimate burden of proof. Petition at 12-13. This is true even if some of the information needed to meet the Section 10 standard is in the hands of other parties. It should be noted that this is frequently the case in litigation, where parties often obtain the evidence that is needed to prove their case through the discovery process. In the forbearance context, the FCC similarly has asked parties, such as cable operators, to provide data not available to the ILECs seeking forbearance at the time the petitions are filed. However, this does not mean that ILECs are relieved of bearing the burden of proof with respect to Section 10. Rather, once petitioners receive such information from the FCC or directly from other parties, they continue to bear this burden.

As Petitioners in this proceeding propose, the party seeking forbearance must demonstrate that it meets each of the three prongs of the Section 10 standard for each of the rules or statutory provisions for which it seeks relief. Too often, petitioners have filed forbearance petitions that do not address each of the three parts of the Section 10 standard individually. For example, in its pending petition to forbear from unbundling obligations in four MSAs, Qwest glossed over the first two prongs of the forbearance standard by failing even to discuss why (1) enforcement of the unbundling requirements is unnecessary to ensure that rates for network elements are just and reasonable and not unjustly or unreasonably discriminatory and (2) enforcement of such regulations is not necessary for consumer protection. *See, e.g.,* Qwest Seattle UNE Forbearance Petition at 3-4. Similarly, in its 6-MSA forbearance petition, Verizon conflated the first two prongs of Section 10 by stating, for example, that "the first two parts of the forbearance test are satisfied as a consequence of the fact that telecommunications in the

New York MSA is robust and rapidly growing." *See* Verizon NY UNE Forbearance Petition at 3-4 (capitalization omitted).

In order to satisfy the first "necessary" prong of Section 10 as it pertains to a defined category of economic regulation (e.g., dominant carrier regulation or unbundling requirements), petitioners should be required to propose specific product and geographic markets to be analyzed and demonstrate that, as a result of the market share, the overall concentration of the market, the market structure (including entry barriers), and the elasticity of supply and demand within those markets, competition is sufficient to render the regulation at issue unnecessary. In order to prevent flawed decisions such as the *Omaha Forbearance Order*, *see supra* Part III.F, such analysis should also include a substantial analysis of the wholesale market.

To satisfy the second "protection of consumers" prong, petitioners should be required to demonstrate that the rates, terms, and conditions of services, as well as the number and types of competitive alternatives available to downstream retail customers, will not be adversely affected if the statutory provision or regulation at issue is eliminated through forbearance.

Finally, in order to meet the third "public interest" prong, petitioners should be required to demonstrate that elimination of the regulation at issue will affirmatively "promote competitive market conditions." It is not enough that elimination of the regulation leaves market conditions essentially the same. Instead, the petitioner must be required to demonstrate that each relevant market will actually become *more competitive* as a result of forbearance. Vague predictions of possible future benefits such as the Commission's "predictive judgment" in the *Omaha Forbearance Order*, *see supra* Part III.F, are clearly insufficient for this purpose.

C. The FCC Should Establish Pleading Schedules For Forbearance Petitions That Provide Interested Parties With A Meaningful Opportunity To Respond.

The Commission should establish, as Petitioners in this proceeding suggest (at 26-27), a firm pleading schedule under which (1) interested parties may file motions to dismiss forbearance petitions for failure to meet the criteria discussed herein; (2) the party that filed the forbearance petition may respond; and (3) the FCC rules on the motions. The specific schedule proposed by Petitioners in this proceeding (*i.e.,* that motions be filed within 45 days of the filing of the petition, oppositions be filed on day 55, replies to oppositions be filed on day 60, and the FCC rule on motions to dismiss on day 75) seems appropriate.[53]

As Petitioners propose, the FCC must also preclude the filing of substantive *ex partes* in forbearance dockets at the last minute. The schedule proposed by Petitioners for *ex partes* other than those specifically requested by the FCC (i.e., that (i) the party seeking forbearance may not file an *ex parte* after the date that is 30 days from the statutory deadline; and (ii) interested parties may not respond to such *ex parte* later than 21 days before the deadline) is appropriate. *See* Petition at 28-29. If adopted, this schedule would ensure that interested parties have a meaningful opportunity to comment on forbearance petitions and that the Commission has adequate time to review and analyze such comments. *See supra* Part III.B.

D. The FCC Should Issue Protective Orders That Provide Interested Parties With "Full, Fair, and Timely" Access To Confidential Information.

As Petitioners in this proceeding contend, "it is essential that interested parties be afforded full, fair, and timely access to all relevant documents upon which the [forbearance]

[53] As Petitioners suggest (at 26), the FCC should also set forth a specific timeframe and procedure for state regulatory commission filings regarding forbearance petitions. The schedule proposed by Petitioners in which state commissions must submit their input into the record on day 90 is appropriate.

petitioner relies." *Id.* at 20. This will reduce the injustice from parties' inability to access or use critical information that forms the basis for the legal standards under which petitions are decided. *See supra* Part III.B. Accordingly, the Commission should adopt Petitioners' proposals that the FCC (1) adopt a protective order for each forbearance proceeding within 21 days of the filing of the petition (*see id.*); (2) remove the prohibitions on photocopying materials (*see id.* at 21); (3) make confidential information available in searchable electronic format (*see id.* at 21-22); and (4) permit authorized persons to use proprietary information in related FCC proceedings (*see id.* at 22-23).

E. The FCC Should Establish Limits On The Withdrawal Of Forbearance Petitions.

As explained in Part III.D, parties seeking forbearance have withdrawn their petitions at the eleventh hour when they believed that the FCC would deny the relief sought, a practice that carries with it several harmful consequences as discussed above. Accordingly, the FCC should rule that any forbearance petition withdrawn after 90 days is deemed denied without prejudice to refiling the same or a similar petition for one year.

F. The FCC Should Establish Voting Rules For Forbearance Petitions.

In order to minimize the likelihood that future forbearance petitions are "deemed granted" by operation of law, *see supra* Part III.G, the FCC should interpret the term "deny" in the context of Section 10 to mean that a 2-2 tie vote by Commissioners constitutes a denial of, rather than non-action with respect to, the forbearance petition at issue. There is significant precedent for such treatment of deadlocked votes. For example, in *In re Radio-Television News Directors Ass'n*, No. 97-1528, 1998 U.S. App. LEXIS 13041, at *2 (D.C. Cir. May 22, 1998), the D.C. Circuit held that "denial of a petition due to a deadlocked vote by members of a governing body constitutes a final agency action that is reviewable by this court." The D.C.

Circuit consequently reaffirmed its decision in a published opinion, holding that "a deadlocked vote on a proposal" constitutes "reviewable, final agency action in support of the status quo." *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 880 (D.C. Cir. 1999). In the forbearance context, a deadlocked vote likewise constitutes agency action denying the relief sought.

G. The FCC Should Establish A Formal Policy For The Release Of Forbearance Orders.

Finally, the FCC must establish a rule requiring it to release orders granting and/or denying forbearance petitions before the statutory deadline for action on such petitions. Although the Petitioners in this proceeding have proposed that the FCC release forbearance orders no later than seven days following of the close of the statutory deadline, *see* Petition at 32, this is not the appropriate approach. The Commission must release forbearance orders prior to the statutory deadline, because its failure to do so can be interpreted as a failure to act on a petition in a timely manner. As Qwest argued in its appeal of the *Omaha Forbearance Order* before the D.C. Circuit, in order to give legal effect to any vote to grant or deny a forbearance petition, "the FCC has to take further action—*no later than the statutory deadline*—to inform those affected, in a legally binding way, of how and in what respects the laws are being forborne or will continue to apply."[54] For this reason, issuing a vague and incomplete news release with a backdated effective date prior to the statutory deadline, as was the case in the Omaha forbearance proceeding (*see supra* Part III.D), is unacceptable. This is especially true in light of the fact that the Commission itself has held that news releases do not constitute official action that can be

[54] Brief for Petitioner Qwest Corp., No. 05-1450, at 20-21 (D.C. Cir. filed Aug. 7, 2006) (emphasis in original).

relied upon.[55] Moreover, Congress could never have intended to leave the issues raised by a petition for forbearance to remain open after the specific deadline to act that it imposed on the FCC in Section 10(c).[56]

V. CONCLUSION.

For the foregoing reasons, Joint Commenters strongly urge the Commission to adopt the procedures described herein to govern forbearance petitions filed pursuant to Section 10 of the Act.

Respectfully submitted,

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[55] *Id.* at 18-19.

[56] *See AT&T v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) ("Nothing in Section 10(a)(3) allows the Commission to avoid ruling on the merits of a forbearance petition whenever it finds the statutory deadline inconvenient. Quite to the contrary, section 10(a)(3)'s very purpose is to force the Commission to act within the statutory deadline.").